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No. 130

In the Supreme Court of the United States

October Term, 1931

STEFANO BARBIVIERI, APPELLANT

vs.  
THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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## **BRIEF FOR THE UNITED STATES.**

This is one of a group of seventy claims, whose aggregate amount exceeds \$500,000 (Finding VII), in which the plaintiffs seek to compel the United States to pay damages for injuries which their property sustained by reason of floods, due to excessive and unusual rainfall. It is an attempt to convert an "Act of God" into a fictitious "taking" by the United States Government of plaintiff's lands. The alleged "taking" and the resultant implied contract to compensate for such "taking" are claimed to result from the fact that the Calaveras River, in California, on several occasions overflowed a canal constructed by the United States, due to abnormal and almost unprecedented rainfalls, and thus temporarily submerged the plaintiff's lands.

Little, if anything, could be added to the very able opinion of the Court of Claims, which seems to me

to vindicate fully its conclusions. The Government could profitably rest its case upon that opinion.

### I.

#### INSUFFICIENCY OF THE PETITION.

Preliminarily we suggest that the case could well have been dismissed upon the plaintiff's petition, for it wholly fails to make any averments which would give rise to an implied contract on the part of the Government to compensate the plaintiff for the temporary injury that he sustained through the excessive rainfall. If this be so, this Court would be relieved of examining the exhaustive findings of fact of the Court of Claims and can sustain the judgment entered by it, because the plaintiff was unable to state a case which was even within the jurisdiction of the Court of Claims.

The petition, after averring that the Calaveras River rises in the foothills of the mountains to the northeast of the City of Stockton, alleges (R. 1, 2, and 3):

### III.

Both the Calaveras River and the Mormon Slough *have always been subject to flood stages from the rains and melting snows in the mountains*, and the effect of said flood waters was to inundate, or subject to inundation, annually a portion of the city of Stockton with the waters of Mormon Slough, but the lands hereinafter described were never submerged nor subject to submergence by said water-courses in the flood stages.

## IV.

For the purpose of relieving the city of Stockton from the conditions described by the last preceding paragraph, Congress, by the Rivers and Harbor appropriation act approved June 13, 1902, provided as follows:

"For the rectification of the Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon channel into Calaveras River in accordance with the report submitted in House Document numbered 152, Fifty-fifth Congress, third session, fifty thousand dollars: *Provided*, That a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete said project not to exceed in the aggregate \$175,000 exclusive of the amounts herein and heretofore appropriated. *Provided further*, *That the City of Stockton or the State of California shall first furnish to the United States the right of way for said canal.*" 32 Stats., Part 1, p. 368.

## V.

Subsequently thereto, the rights of way having been procured as provided in said act, the Government of the United States began the construction of the canal therein provided for, and later acts of Congress making additional appropriations, the same was completed about 1910 and the channels of the Mormon Slough and the Calaveras River were con-

nected, the course of the canal being southeasterly to northwesterly. Said canal would not have been constructed but for the taking over of the project by the United States.

## VI.

Said canal, however, proved to be insufficient to take care of the flood waters of the Mormon Slough and in the spring of 1911 the rains and melting snows from the mountains and hills came down through Mormon Slough and were diverted into and through said canal in such volume and force that the same overflowed and the adjacent lands were submerged for a considerable distance on the north and east of said canal, while the force of the current was such that it broke through the levee on the opposite bank of the Calaveras River (the channel of which was itself insufficient to carry off its own waters and the added waters of said Mormon Slough) and flooded a very considerable area to the north and west of said river. All of said lands were in a high state of cultivation and very valuable.

## VII.

The result of said overflow, which has since been recurrent, has been to destroy the growing crops and cover portions of the overflowed region with said gravel, noxious weeds, and other obstructions to cultivation; on other portions to wash away the topsoil completely down to bedrock, rendering the same unfit for cultivation; to demolish and injure the fences,

buildings, fruit trees and vines, and other improvements, and, generally, to do the damage that would naturally ensue upon floods of volume and violence. Beside the direct damage done by the flood of 1911 and subsequent recurrences, the danger and probability of future recurrences of floods have so diminished the value of the lands subject to overflow that they are now worth but a fraction of their former value. Some of the lands when overflowed must be pumped out at great expense and the protective works rebuilt.

\* \* \* \* \*

## IX.

The effect of said construction work by the United States was, and has been, to take the property of the owners and tenants of land within said flooded area, including petitioner, by reason of which petitioner has been damaged in the sum shown by his bill of particulars hereunto annexed. \* \* \*

Such is the statement of plaintiff's claim. It, therefore, appears that before the Government constructed the canal for the benefit of the people of California that the two rivers, the Calaveras and Mormon Slough, had "always been subject to flood stages from the rains and melting snows in the mountains, and the effect of said flood waters was to inundate, or subject to inundation, annually a portion of the city of Stockton."

The statement further shows that while the United States was willing to construct for the benefit of the

people of Stockton and surrounding country a canal to divert the waters, it had no intention to appropriate any property under the right of eminent domain, for it refused to do the engineering work unless the city of Stockton or the State of California appropriated *at their own expense* such land as was necessary for the new channel.

The statement further shows that the canal which the Government constructed upon a right of way acquired by the State of California proved insufficient in the spring of 1911 to take care of the rains and melting snows and that, by reason of the unusual demand thus put upon the canal by such natural causes as the law denominates the "act of God," the lands of the plaintiff and other abutting property owners were temporarily submerged.

It is true that the petition vaguely suggests that the flood, which took place in the spring of 1911 and first caused the overflow of the canal, has recurred in subsequent years, but how "recurrent," to use the phrase of the petition, the flood stages are, the petition does not aver. Whether the subsequent floods were frequent or infrequent, and whether they lasted an hour, a day, or a month, is undisclosed by the petition. In some subsequent years the abnormal flow of water due to the excessive rainfall and melting snows of the spring season did again temporarily overflow the banks of the river, and for a short time submerged the upland, but there is no suggestion that the channel was not ordinarily adequate to

carry off the waters. The proximate cause of the plaintiff's injury was, therefore, abnormal high water due to unusual spring freshets.

Obviously, the plaintiff can not recover simply because the Government may, or may not, have constructed an adequate canal. The United States was under no obligation to construct any canal. The law did not compel it to insure the adequacy of the canal for abnormal conditions, and even if the Government engineers failed to take into account the possibility of unusual spring floods, at worst their lack of foresight could only amount to engineering errors or negligence, and the United States is immune from suit by reason of damages due to such error or even negligence.

I am assuming, *arguendo*, that the engineers were mistaken in constructing this canal in not making due allowance for the extraordinary floods in exceptional years of a mountain region, but I am not conceding, except for purposes of argument, that there was any negligence on the part of the engineers. Indeed, the petition does not charge that the canal was not properly constructed and with a fair regard for the best interests of all concerned. It simply charges that in the spring of 1911 and at some recurrent periods—how frequent or infrequent it fails to say—that the canal, although normally adequate, was unable to cope with exceptional conditions which nature temporarily imposed upon it.

The petition does not suggest that the United States intended to flood the plaintiff's lands. It does not

suggest that the United States intended to take the plaintiff's lands. The only averment which suggests the ground of liability is in Paragraph IX, above quoted, which says:

The *effect of said construction work* by the United States was, and has been, to take the property of the owners and tenants of land within said flooded area.

This, however, is only an averment of a legal conclusion. To give the Court of Claims jurisdiction and to justify a judgment against the Government, it was necessary that the plaintiff should allege that the United States had entered into a contract, whether express or implied, to "take" these lands under the right of eminent domain.

Undoubtedly, when the United States appropriates property for public purposes an implication arises of a contract to pay for the lands thus *intentionally and deliberately* taken.

But the petition does not suggest that the United States thus intended to take plaintiff's land for permanent improvements, but only avers that because a canal proved insufficient to carry off exceptional flood waters "*the effect*" was to "take" the plaintiff's lands.

The law does not justify any such conclusion. Whether the United States has appropriated property for public purposes under the right of eminent domain is in each case a question of fact and must be averred as such.

It is true that the fact may be proved as an inevitable implication of other facts. Where, therefore, it is clear that the United States has *intentionally* and *permanently* taken possession of the lands of a citizen, the implication of a contract to pay for the value is inevitable. But in every such case the implication must result from some act of the Government which in itself is unequivocal and indubitable.

Where, however, the act is due to conditions over which the United States has no control, then there is no ground for the implication, even though the Government in its operations may have been a contributory cause.

It may be that the United States, in assuming the duty of constructing this canal, should have taken into account the possibility of spring floods of unprecedented violence. Its failure to do so may have been due to the mistakes, or even negligence, of its engineers, or it may have been due to the fact that in the judgment of the Government such anticipation of abnormal occurrences of nature would make the cost of the canal prohibitive and that the gratuity of the Government in constructing the canal for the benefit of the people of California did not extend beyond the reasonable provisions for the ordinary requirements of the river.

It does not matter which of these assumptions is correct. Neither of them would constitute a "taking" of the plaintiff's lands or justify an implied contract to pay for damages which might result from a mis-

calculation of the requirements of the canal, or an unwillingness to make provision for unusual conditions.

As the opinion of the Court of Claims well shows, the line of demarcation between incidental damage due to the operations of the Government, whether skillful or negligent on the one hand, and the conscious, deliberate, and unequivocal appropriation of private property for a public purpose on the other hand, is clear and not only affects the right of recovery but even the jurisdiction of the Court to entertain the controversy. Obviously, the immunity of the Government from suit in actions sounding in tort can not be frittered away by the gratuitous fiction that every time the Government by its necessary operations incidentally injures private property, there is thereby a "taking" of such private property and an implied contract to pay.

This distinction being clear, the failure of the petition to allege any deliberate and intentional appropriation by the United States of the plaintiff's property should have been sufficient to dispose of the case, and, presumably, this would have resulted had the Government demurred to the petition instead of entering a traverse.

## II.

### FINDING OF FACT CONCLUSIVE.

Whatever doubt there may be as to the sufficiency of the petition there can, we submit, be no doubt as to

the justice of the judgment upon the facts as found by the Court of Claims.

From them it appears that the capacity of the natural channels of the Calaveras River "is so limited that during freshets a considerable part of the waters flow across the country, not uniformly distributed but for the most part carried in shallow depressions or swales \* \* \*." (R. 5.)

Finding III states (R. 6):

\* \* \* \* \*

The Calaveras River was and is a "*rainy weather*" or "wet season" river, supplied by rains exclusively or very nearly so, rising and falling in proportion to the rainfall and dry during a portion of each year, and Mormon Slough possessed much the same characteristics except that after the diversion to it of a part of the waters of the river it carried more water than the river and became practically the main channel. Until about 1862 the low water flow of the Calaveras River was carried in what was known as the Old Calaveras River, none of it passing into Mormon Slough, but after a very high water in 1862 the flow was largely diverted into Mormon Slough.

\* \* \* \* \*

The territory lying between the Calaveras River and the Mormon Slough had always been subject to flooding to a greater or less extent, caused by breaks in the low levees along the Calaveras and the slough or the overflow of these streams and heavy rainfalls on the

area, and the city of Stockton had been subject to frequent floods, but they were not serious, as most of the flood waters passed to the north of the city, until the Mormon Slough became the principal outlet of the upper Calaveras River and the principal drainage channel for the contiguous watershed. In periods of high water the slough carried large quantities of sediment, and prior to the construction of the diverting canal this sediment was deposited near its mouth and in the Stockton Channel, interfering with navigation and entailing necessary annual expense for dredging, in addition to which the water carried by the slough frequently flooded portions of the city of Stockton.

The nature of the flood which caused the damage for which this suit is brought is thus stated in Finding V (R. 9):

High waters in the Calaveras River section generally occur during January, February, and the earlier part of March, and, to a greater or less degree, dependent on the amount of rainfall, *are of almost annual occurrence*. The waters rise and recede rapidly and flood conditions are frequently of recurrence in the same year during those months.

At the time the diversion canal project was prepared, which was in 1898, several years before its actual construction, there was but little available data as to the flood discharge of the Calaveras River and Mormon Slough. There was no gauge until December, 1906, when a gauge was established by the Weather

Bureau near Jenny Lind on the Calaveras, about 25 miles above the canal, after which daily gauge heights at that point were obtainable, but conditions below were not accurately indicated thereby.

In January, 1911, there were two high waters which were of minor importance except for their effect in leaving the watershed in favorable condition for the heavy subsequent run-off, which, by reason of very heavy rains, came on the 30th and 31st of January, 1911, and was an unprecedented flood, unless the flood of 1862 may have been greater, as tradition has it. The levees on the Old Calaveras River and on the Mormon Slough between Bellota and the canal were broken in several places so that they had little effect in confining the course of the water. Some of it flowed south of Mormon Slough and some north of the Calaveras, but the greater part of that beyond the capacity of the river and slough flowed across the country between the river and the slough. From a large break in the levee above Linden, which is about 4 miles below Bellota, the Linden Road, which is in a natural trough, carried a large volume of water. The waters flowing in the slough in great volume and to its capacity were diverted by the dam into the canal except as to some overflow which passed on toward Stockton, and the large volume of water flowing over the country between the slough and the Calaveras was intercepted by the canal and the aggregate volume turned toward the Calaveras, but the volume was in excess of

the capacity of the canal and also, when combined with the waters in the Calaveras, in excess of the quantity which could find a ready and rapid outlet down that stream, with the result that, by reason of the excess quantity of water reaching the canal and the retarding of its flow by the waters in the Calaveras, and also, to some extent, by the bridges over the canal, the lands above or to the northeastward of the canal and for the full length thereof were overflowed, the overflow extending in varying depths from one-half to 1 mile, according to the contour of the land, the greatest distance and depth occurring in the pocket formed by the canal levee and the levee on the north bank of the Calaveras, where a lake was formed. The waters flowing in and parallel with the canal, moving in greater volume and with greater force than those in the Calaveras, threw the current of the river to the levee on the north bank and backed up the waters of the Calaveras to the northeast. Across the Calaveras River, approximately 500 feet below the mouth of the canal, was a bridge or trestle of the Southern Pacific Railroad, which to some extent obstructed the flow of the waters and contributed to the backing up thereof. A result of the backing up of the waters in the Calaveras and the embanking of them against the levee on the north bank thereof was a break in that levee at a point above and opposite the mouth of the canal and the break was soon enlarged by erosion. On the north of the river below or westward from

this break was an embankment of the Southern Pacific Railroad, containing a 15-foot trestle and two small culverts, and this embankment tended to restrain the waters flowing through this break and also flowing down on the north side of the river and, in a triangular pocket between it and the levee on the north side of the river, another lake was created contiguous to that on the other side above the canal. Low-lying lands, extending for a considerable distance north of the river and for some considerable distance both above and below this break in the Calaveras levee, were flooded, but the waters flowing through the break were not the only cause thereof. Waters flowing down the north side of the river from breaks above and in waterways on that side thereof contributed thereto. The proportionate contribution from either source does not appear and is speculative.

The years 1912 and 1913 were comparatively dry years and there were no high waters of consequence, but in 1914, 1915, 1916, and 1917 there were floods which to a greater or less extent inundated the lands northeast of the canal. By reason of the filling of the canal by deposits during successive floods a less volume of water caused a flooding of these lands. In 1914, when the highest water after 1911 occurred, it attained a height on these lands within 1 foot of that of 1911, and in this year the flood again broke through the levee on the north side of the Calaveras which had been in some manner repaired after the flood of 1911.

The duration of flooded conditions on these lands varied, dependent on the duration of the rains causing them and the time necessary for the accumulated waters to find their way down the Calaveras. Sometimes floods *ran off in a few hours*. In 1911 flood conditions lasted for two days. At times in later years as one flood ran off a recurrence of heavy rains caused a recurrence of flood conditions. The rapid run off of floods immediately cleared these lands of water except as to low places having no outlet, where the water remained in pools until absorbed by the earth.

During the flood of 1911 a large quantity of water flowing over the area between the Calaveras River and Mormon Slough flowed onto the lands northeast of the canal and would have flowed thereon if the canal had not been constructed. *To what extent these waters in 1911 would have accumulated on, flooded, or damaged these lands but for the canal does not specifically appear and is speculative.*

I call attention to the portion of this Finding last italicized, for it thus appears that the plaintiff failed to satisfy the Court of Claims that if the Government canal had never been constructed the almost unprecedented flood of 1911 would have had any different result.

As to the special damage done to the plaintiff's land the findings are (R. 18, 19):

The flood of January 30-31, 1911, covered both of these tracts to an approximate depth

of from  $2\frac{1}{2}$  to  $4\frac{1}{2}$  feet with some slightly greater depth over a few low places. The water immediately surrounding the residence attained a depth of near  $3\frac{1}{2}$  feet, or approximately  $2\frac{1}{2}$  feet below the main or first floor, and flooded the basement or cellar. As the flood increased, the water moved in the canal with considerable rapidity, and for a time flowed over a part of the land, particularly that in and toward the pocket, with a rather strong current, but when the coming together of the waters in the canal and river had so augmented the volume that it could not find a ready outlet and began to back up in the river the water over these lands became sluggish and moved with but little current. *This flood continued for about two days*, but what its varying stages during that period were, except the maximum as stated, is not shown.

At the residence the front steps to the veranda were washed away. It is not satisfactorily shown that the house was otherwise damaged or rendered in any wise uninhabitable or unsafe for occupancy. It was in good condition inside and out after this and subsequent floods. Stefano Sanguinetti lived in this house during this flood and continued to live there until some months after the flood of 1914, when he moved to Stockton. It is asserted that he was "driven out by the floods." It does not appear that there was any reason why he might not have continued in the occupancy of the house except the inconvenience entailed during the brief periods

when it was surrounded by water. One of his sons was farming the land during 1911 and subsequently as a tenant. The amount of actual damage to the house by the flood of 1911 is not shown, *but it was negligible*. It was not materially depreciated in value by that flood. It was depreciated in value by that flood in conjunction with floods of subsequent years, indicating a continuing danger of recurrence of floods in flood seasons and consequent inconvenience. That depreciation was 25 per cent of its value.

\* \* \* \* \*

*None of this land was permanently overflowed nor was it overflowed for such length of time, either in 1911 or subsequent thereto, as to prevent its use for agricultural, horticultural, or orcharding purposes. It has been cultivated and the products of the orchard marketed each year since the flood of 1911, and there have been recurrent floods of greater or less magnitude each year except the dry years of 1912 and 1913. \* \* \**

As to whether or not the United States intended to "take" the plaintiff's property in the manner described the Court of Claims found as follows (R. 12):

#### VIII.

It is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here in-

volved or had any reason to expect or anticipate that such results would follow. The fact that the canal was of insufficient capacity to care for the waters coming down Mormon Slough augmented by the waters flowing to it over the area between the slough and the river, during periods of very heavy rains and extremely high water, was an engineering mistake due to lack of accurate information as to the conditions to be met during such periods. The engineers of the United States who made the preliminary examination and recommended the plan reached the conclusion based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers. Work was done on the Calaveras below the mouth of the canal both by dredging and by depositing the dredged materials on the levees on the north side, but whether this part of the work was completed as recommended does not satisfactorily appear.

I submit that this finding of fact on the fundamental question of the implied contract is conclusive of this controversy. It expressly negatives the suggestion that when the United States constructed this canal, it anticipated the canal's incapacity to prevent

the flooding of adjoining lands under unusual conditions. Assuming that it was the duty of the United States to anticipate extraordinary conditions and unprecedented spring freshets, the failure to construct a canal sufficient for any possible contingency was a mistake of the United States Army engineers. It is unimportant whether the mistake was excusable or inexcusable, but the finding indicates that the mistake was excusable, as the engineers did not have sufficient data to determine what the requirements of the canal should be to meet such unprecedented rainfall as happened in 1862 and 1911.

### III.

#### THE AUTHORITIES.

Under these circumstances and with this express negation as a finding of fact of any "taking" by the United States Government, it hardly seems necessary to review the authorities on the subject of what is a "taking" within the meaning of the Constitution. The Court of Claims thoroughly examines and reviews the preceding decisions of this Court and its careful discussion makes any further discussion of the authorities in this brief somewhat superfluous.

The two cases which come nearest to supporting the plaintiff's claim are the cases of *United States v. Lynah*, 188 U. S. 445, and *United States v. Cress*, 243 U. S. 316.

In the first of these cases this Court, by a bare majority of one, held that where the Government

constructed an embankment along a navigable river, whose *direct, immediate, and necessary* effect was to cause a *permanent* overflow of the plaintiff's lands, that it was a "taking" within the Fifth Amendment of the Constitution.

Unquestionably the Government may manifest its purpose to appropriate property by its acts as well as by its words. For example, if the Government desired to tear down a building and it was obviously necessary to use the adjoining land for the *débris*, it would not matter whether the Government first appropriated the adjoining land by formal proceedings and then tore down its building, or whether it first tore down its building and covered the adjoining land with the *débris*. In either case the formal verbal avowal of an intention to appropriate, or the direct appropriation by the necessary results of unequivocal acts, amounts to the same thing. It was obvious that in the *Lynah case*, the *direct, certain, immediate, and necessary result* of the construction of the embankment was the overflow of Lynah's land. And, from the essential nature of the act, this court drew the reasonable inference that the Government intended to overflow Lynah's lands, and thus to appropriate them. There was a direct connection between the Government's operations and the claimant's lands, both with respect to space and time.

In the cases at bar, however, all these elements are absent. It can not be said that, when the Gov-

ernment undertook to construct this canal, the overflow of plaintiffs' land was so direct, immediate, and inevitable as to suggest a conscious and deliberate appropriation by the Government. In a word, the distinction which must exist between these cases of a true "taking," on the one hand, and the indirect and unascertainable consequences of a lawful act on the other must lie in an intention to take, whether that intention be expressed or implied.

There must be an intention on the part of the United States, either expressed or implied, to take the property of another before there can be any implied promise to pay or contract liability incurred. This liability may be inferred where the results naturally and indubitably flow from the act or effect of the act and may be definitely ascertained or determined.

The case of *United States v. Cress*, 243 U. S. 316, 327, upon which the plaintiff will, I assume, chiefly rely, is also plainly distinguishable. Unfortunately the trial court did not state in its opinion the facts of the case in any detail. The findings were very meager. The Supreme Court interpreted the findings as showing "that this is not a case of *temporary* flooding or of consequential injury, but a *permanent* condition, resulting from the erection of the lock and dam, by which the land is 'subject to frequent overflows of water from the river.'"

The Court of Claims in its opinion in the instant case well points out that in the *Cress case* the Court

was considering "the effect of backwater caused by the dam in the performance of its usual and intended functions." The Court of Claims suggests that in the *Cress case* a movable dam may have been under consideration, and that the overflow of the adjoining lands therefore occurred at the volition of the Government in regulating the use of the dam. For this reason, and as the adjoining land was submerged whenever the Government desired by its presumably movable dam to create a back pool of water, this Court held that there was an intention on the part of the Government to subject the adjoining lands to an easement of occasional submergence.

I submit that this is the true interpretation of the *Cress case*; certainly the opinion of this court in that case does not justify an inference that the submergence of lands, the proximate cause of which was an act of nature and not of the United States, would constitute a "taking" by the Government. In such a case the elemental forces of nature temporarily take the plaintiff's lands and not the United States, although the inadequacy of the Government's public works may have been *incidentally* contributory to the injury.

Without further considering the authorities, which have been so ably reviewed by the Court of Claims, let me only refer to two very recent cases, decided by the Supreme Court since the Court of Claims dismissed the plaintiff's petition in the instant case. These two decisions are the latest expressions by this

Court of the law of the case and both sustain the Government's contention.

The first of these cases is *Horstmann Co. v. United States*, 257 U. S. 138. In that case the United States undertook an irrigation project under which it constructed dams, canals, and other structures to distribute water to various tracts of land in the Carson River Valley district. The plaintiff had a soda plant upon a crater lake which was several miles distant from the Government dams and canals. As soon as the Government works were in operation the water of the Soda Lake steadily rose until it had completely submerged and permanently destroyed the plaintiff's soda plant. The plaintiff contended that this was due to seepage from the waters of the Government canal, and while the Government disputed this, this Court assumed as a fact that the Government irrigation project had caused the rise in the water of the lake and the destruction of plaintiff's property.

Here, then, two significant facts were the basis of the judgment: (1) That the submergence of the plaintiff's property was wholly and exclusively due to the Government's irrigation project, and (2) that the plaintiff's property had been wholly and permanently taken by this submergence.

This Court, after saying that "it would border on the extreme to say that the Government *intended* a taking by that which no human knowledge could even predict," added (p. 146):

Any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability. This comment is of especial pertinence. That the result of the Government's work to the properties of plaintiffs could not have been foreseen or foretold is a necessary deduction from the findings of the Court of Claims. The court found that there is obscurity in the movement of percolating waters, and that there was no evidence to remove it in the present case, and necessarily there could not have been foresight of their destination nor purpose to appropriate the properties.

The pertinency of this reasoning to the present case is that under Finding VIII, quoted *ante* p. 18, it appears that the United States engineers in the instant case, as in the *Horstmann case*, never anticipated that the character of their work would result in any flooding of adjoining lands. The instant case is stronger than the *Horstmann case* because in the latter case the flooding was wholly due to seepage from the Government's canal, whereas in the instant case the Government's canal was only contributory in the sense that it was not adequate to meet the contingency of an extraordinary freshet.

The most recent case of this character is *Kcookuk Bridge Co. v. United States*, 260 U. S. 125, decided November 13, 1922. In that case the United States was deepening a channel of the Mississippi River and in blasting the rock at the bottom of the river with

dynamite it caused waves to submerge and partly destroy the pier of plaintiff's bridge. This Court said:

However small the damage, it may be true that *deliberate* action in some cases might generate the same claim as other forms of *deliberate* withdrawal of property from the admitted owner. *United States v. Cress*, 243 U. S. 316, 329. But without considering how the line would be drawn when such action took place in the improvement of navigation, it is enough to say that this is *an ordinary case of incidental damage* which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States. See *Bedford v. United States*, 192 U. S. 217, 224.

Applying this reason to the instant case, it may be true that if the United States deliberately intended to submerge the plaintiff's lands by the construction of the canal in question that recovery might be had; but as the findings negative any such intention, and as the normal and ordinary conditions of the canal are quite inconsistent with any such intention, the instant case, as the *Keokuk Bridge case*, presents "an ordinary case of incidental damage which, if inflicted by a private individual, might be a tort, but which could be nothing else."

#### IV.

#### CONCLUSION.

I have probably argued the case at undue length, but as it is one of a group and involves a substantial sum of money, it seemed best to present the Govern-

ment's views, even though the able opinion of the Court of Claims had made any further argument superfluous.

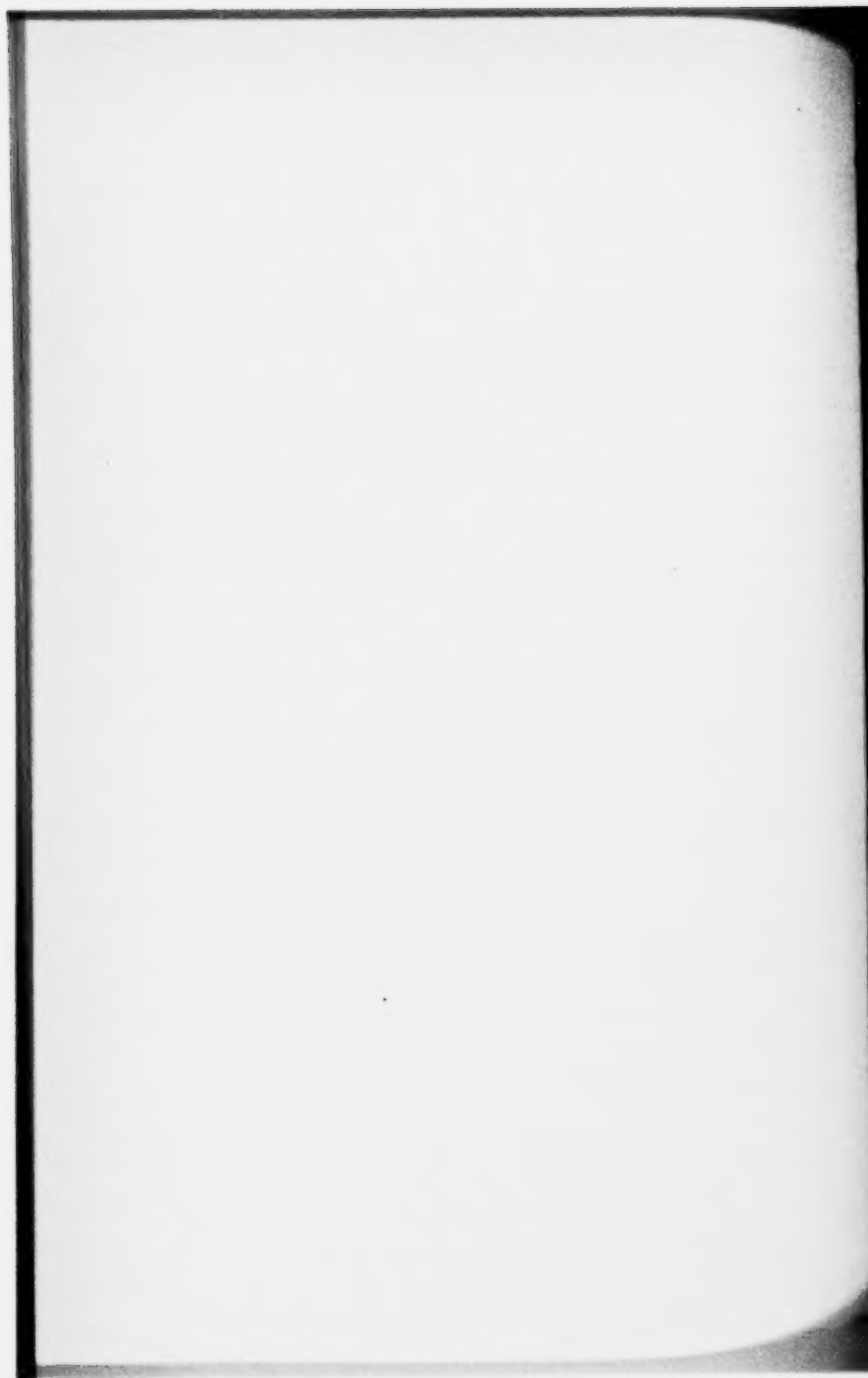
I submit it is important that this Court should maintain the clear line which separates the deliberate appropriation of private property for public uses from the cases where the Government in its operations, with or without due care, inflicts some incidental damage upon a private citizen.

It may be true that morality requires that the Government should be as responsible for the consequences of its torts as an individual. Such, however, is not the law, and the immunity of the Government from suits in tort should not be impaired or frittered away by a too generous fiction of a "taking" which no one ever contemplated.

Respectfully submitted.

JAMES M. BECK,  
*Solicitor General.*





W. S. STANTON

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1923.

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No. 130.

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STEFANO SANGUINETTI, APPELLANT,

vs.

THE UNITED STATES.

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**Motion of Appellant For Remand to Court  
of Claims.**

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BENJAMIN CARTER,  
*Attorney for Appellant.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1923.

---

No. 130.

---

STEFANO SANGUINETTI, APPELLANT,

*vs.*

THE UNITED STATES.

---

**Motion of Appellant For Remand to Court  
of Claims.**

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1. Appellant respectfully refers the court to a brief filed on its behalf in this case and to comments therein, at pages 20 to 23, on parts of the findings of fact made by the Court of Claims in regard to the expectation and purpose of the responsible engineers of the United States Army when they put into the plan of the improvement in question a levee, bordering a diverting canal, and it says:

The record of this case at the Court of Claims does not include any evidence regarding the function to be performed by said levee. The only evidence in existence on this question is contained in various reports of said engineers, some of which are copied or cited in said brief. Those evidences are entirely harmonious and are contradictory of said findings. After the case was decided by the Court of Claims and said findings of fact filed, a motion was filed by the claimant quoting some of said reports and asking that they be included

in the findings, but said motion was overruled by the court, and therefore there was no evidence to support the finding made, and, as said brief shows, the finding is in conflict with the facts and with the real evidence which might have been considered.

Said portion of the findings and said motion filed at the Court of Claims for insertions therein are appended hereto as, respectively, "Exhibit A" and "Exhibit B."

Claimant moves that the case be remanded by this court to the Court of Claims with directions to report to this court, by amendment of the findings of fact or otherwise as this court may determine, whether there was any evidence before it, not contained in any of the engineering reports, regarding the functions which said army engineers, in designing and constructing said improvement, expected and intended that the levee would, or might, perform.

2. Claimant refers the court to the petition (Record, pages 1 to 4), to comments made thereon in the findings of fact (Rec., page 20) and in said brief filed herein for appellant (page 23), and it says:

Defendant's brief was filed, and the case closed for the making of proof, on May 13, 1919. On October 9 following a motion was filed by defendant to reopen the case for the taking of additional proof. Said motion was overruled by the court on November 10 following and an order made setting the case for hearing "the first week in December." The case was called by the Court of Claims for trial on December 3 following. The attorney having the prosecution of the case in charge asked for a continuance and showed that the case could not have been, and was not, ready for hearing at that time, (a) because the claimant of record, Stefano Sanguinetti, had died since the petition was filed, and there had been no substitution of a claimant, (b) because amendment of the petition was necessary

for the introduction of competent matters which had been developed in the taking of proof, and (c) because a brief, in reply to that filed for defendant, seemed to be necessary but could not be drawn aptly until the matter of reopening the case had been decided and that since the ruling of the court regarding said reopening there had not been time. The court overruled said request for continuance and compelled that the case be argued and submitted, and it was argued and submitted, forthwith. Before said argument an amended petition had been prepared provisionally in the names of Geromina Sanguinetti and others, as heirs of said Stefano Sanguinetti, and at the hearing the court was informed of this fact and, in the expectation of claimant's counsel that the court, in deciding or otherwise acting upon the case, would either permit or forbid the filing of said petition, it was put into the hands of the court with the papers already filed; but the court did not make any order regarding said proposed petition. A motion of said heirs, to amend findings and set aside judgment having first been filed, argued, submitted and overruled, said heirs, on May 28 following, presented for filing a motion for leave to amend the petition, by substituting said provisional petition previously presented and, to that end, to set aside the previous submission of the case, and on June 7 following the same was overruled by the court. Appellant, Jeromina Sanguinetti had been appointed and qualified as administratrix *de bonis non* of the estate of said Stefano Sanguinetti. On November 22 following, said heirs filed in this court a petition for a writ of mandamus to the Court of Claims requiring it to permit the filing by them of a petition; which petition was denied by this court. On December 4 following said Jeromina Sanguinetti, as such administratrix, filed a motion at the Court of Claims for substitution as claimant and

by an order of the court on December 13 following this substitution was made. On February 14, 1921, said Jeromina Sanguinetti filed motions in said court to set aside the judgment entered on February 16, 1920, and asking leave to file her petition. These motions, in all respects, were denied by the court the same day.

When Stefano Sanguinetti was dead, and it became necessary to substitute a claimant, or claimants, counsel for the interested parties deliberated and reached the conclusion that the heirs, rather than an administrator *de bonis non*, would be the proper parties. The court having ignored the new petition, drawn in the name of the heirs, it became necessary to obtain a direct and final decision on this question of parties, and this was the purpose, as explained to this court, of the petition of November 22 for a writ to require recognition by the Court of Claims of the heirs as claimants. If the question had not been adjudicated in *limine* and the wrong claimant, or claimants, had been introduced and prosecuted a claim to final decision, the six years limitation on the jurisdiction of the Court of Claims might well have run against the introduction of the proper claimant.

Many times, in recent years, upon a reference by Congress, or one house or a committee thereof, of a claim of an "estate," when it transpired that there had been a full administration, and the executor or administrator discharged, the heirs had been recognized by the Court of Claims as the proper claimants. In this case, moreover, the laws of the State of California, where any moneys recovered would go for distribution, seem to point to the heirs as the proper parties for any legal proceedings. These statutes seemed to cover any case where, an executor or original administrator being sued on some outstanding claim after he had distributed all the assets of the estate, could have sustained a *res judicata*

of *plene administravit*; and explicit provision was made for devolution upon the heirs, after administration, of any subsisting debts of the estate. Such a debt is the judgment rendered by the Court of Claims in this case against the decedent for costs. (Civil Code of California, Deering, Sec. 1408).

As for the administratrix *de bonis non*, it is evident that she had had no day in court for any purpose until December 13, 1920, when the court allowed her substitution as claimant, to take effect as of December 4. Her first step, taken on February 14 following, was to attempt to file her petition. This latter, if admitted, would have supplied those omissions in the body of the petition to which the Court of Claims had adverted.

It seems due to this administratrix either (1) that the court treat the original petition as stating all of those facts upon which the findings of the Court of Claims and the arguments of counsel in this court have been based or (2) that there be on file a petition which would support a judgment in favor of the administratrix if the court takes her view of the law and the facts.

Attached hereto, by the names stated, are the following, which will prove the acts of the parties and of the Court of Claims here stated: "Exhibit C," all docket entries of the Court of Claims in the case; "Exhibit D," motion of claimant to set aside judgment and admit new pleadings.

Appellant moves that, unless the court regards the petition of Stefano Sanguinetti as sufficient for review of the questions of fact presented by the briefs, it will remand the case to the Court of Claims with directions to permit the filing by the administratrix *de bonis non* of such a petition, in form and in substance, as by law she would have been entitled to file when substituted as claimant.

BENJAMIN CARTER,  
*Attorney for Appellant.*

EXHIBIT A.—*Paragraph VIII of Findings of Fact.*

It is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here involved or had any reason to expect or anticipate that such results would follow. The fact that the canal was of insufficient capacity to care for the waters coming down Mormon Slough augmented by the waters flowing to it over the area between the slough and the river, during periods of very heavy rains and extremely high water, was an engineering mistake due to lack of accurate information as to the conditions to be met during such periods. The engineers of the United States who made the preliminary examination and recommended the plan reached the conclusion, based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers. Work was done on the Calaveras below the mouth of the canal both by dredging and by depositing the dredged materials on the levees on the north side, but whether this part of the work was completed as recommended does not satisfactorily appear.

**EXHIBIT B.**

**IN THE COURT OF CLAIMS.**

**No. 32914.**

**JEROMINA SANGUINETTI, AS ADMINISTRA-  
TRIX DE BONIS NON OF THE ESTATE OF  
STEFANO SANGUINETTI.**

*vs.*

**THE UNITED STATES.**

**Motion of Claimant to Amend Findings of Fact.**

Claimant, referring to the findings of fact which were filed in this case on February 16, 1920, and which were adopted again after the substitution of claimant in the stead of his decedent, Stefano Sanguinetti, moves that paragraph IV only of said findings be amended, as follows:

(1) *At the end of second paragraph, on page 4, insert:*

"The project also included a levee to be constructed along the south bank of the canal for control of waters overflowing the canal."

(Report of Chief of Engineers for 1899, Pt. 4, pp. 3191-3193; Rec., pp. 66, 67, 68.)

(2) *Last paragraph of finding, page 5.*

"In adopting the plan for this work it was contemplated that the waters flowing over this area which otherwise would have continued on toward Stockton should be intercepted by the canal and thus diverted to the Calaveras River."

After "canal" insert "and the levee on the south bank thereof."

## BRIEF.

Unquestionably the project out of which this suit grew provided for a levee on the south side of the diverting canal, so placed and of such dimensions as, in case of floods exceeding the capacity of the canal, to hold the excess waters back, causing them to overflow lands north of the canal, until they could find their way to the Calaveras River. The canal then was an integral part of the project; and any flooding of lands attributable to it was foreseen, was intended indeed, by the engineers when they framed the project. That the project had any such features would not be inferred from the findings as they stand. On the contrary the Supreme Court, on appeal, would naturally take the impression that the project included only (1) the canal, (2) the highway bridges and (3) dredging and levee-building in and along the bank of the Calaveras River. This conclusion might well work a fatal injury to claimant, seeing that the levee bordering the diverting canal was the real agent by which the lands of claimants' decedent were flooded.

It is true that the engineering reports, known judicially to the Supreme Court, contain an ample description of the project and thus show the function of the levee in question. But after all these reports are evidence merely; and the Supreme Court might well assume that they had been considered by this court and that there was other contradictory evidence, of greater weight, which brought this court to the conclusion that the levee was *not* an integral feature of the project.

BENJ. CARTER,

*Attorney for Claimant.*

Filed Feb. 14, 1921.

A true copy:

Test this November 9, 1923.

F. C. KLEINSCHMIDT,

*Assistant Clerk, Court of Claims.*

EXHIBIT C.—*Docket Entries of Court of Claims.*

(1)

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

STEFANO SANGUINETTI

vs.

THE UNITED STATES.

No. 32914.

BENJ. CARTER,

*Attorney of Record.*

F. CARTER POPE,

*Of Counsel.*

Aug. 18, 1914. Petition and power of attorney filed. Copies (3) pet. and notice to defendants. Testimony ordered. Amount claimed \$56,000.00.

Mar. 2, 1915. Depns. of Silva Sanguinetti and Stefano Sanguinetti for claimant filed. Parties notified.

Mar. 2, 1915. See Case 32893 for claimant's exhibits No. 8 and No. 9.

July 17, 1916. See case 31191 for joint motion of parties to consolidate.

July 17, 1916. See case 31191 for stipulation for introduction of certain evidence.

July 24, 1916. See case 31191 for action of court on motion to consolidate.

Sept. 24, 1917. See case 31191 for depositions of F. F. Lyons, Frank Stark with exhibits attached for defendants and claimants.

Oct. 11, 1917. See case 32912 for exhibits to depositions filed this day in case 32912.

Nov. 13, 1917. See case 31191 for exhibits to depositions filed Sept. 24, 1917.

May 13, 1918. Case placed on trial calendar by

the court and set for trial Nov. 12, 1918. Claimant's brief to be filed by Oct. 5, 1918.

Nov. 12, 1918. Continued, February Call. Claimant's brief to be filed Dec. 15, 1918.

March 10, 1919. Claimant's brief to be filed by March 25, 1919.

March 31, 1919. Claimant's brief to be filed by April 15, 1919.

April 15, 1919. Claimant's request for findings of fact and brief filed. Copies (5) and notice to defendants.

May 21, 1919. Defendant's objections to plaintiff's proposed findings of fact, and request for findings of fact and brief filed. Copies (10) and notice to defendants. (Walker.)

Oct. 9, 1919. See case No. 31191 for defendants motion to remand for the purpose of taking further evidence filed.

Oct. 15, 1919. See case 31191 for affidavit of Philip G. Walker as to taking testimony for defendants filed.

Nov. 5, 1919. See case 31191 for defendant's memorandum in support of motion to remand case for the purpose of taking further evidence filed.

Nov. 10, 1919. Defendants motion to remand (filed Oct. 9, 1919) overruled. Case continued and set for trial for first week in December.

Dec. 3, 1919. Argued and submitted on merits.

Dec. 18, 1919. Claimant's motion for leave to file reply brief filed in open court. Copy to defendants.

Dec. 19, 1919. Claimant's motion for leave to file reply brief allowed. See note.

Dec. 22, 1919. Claimant's reply brief (typewritten) filed. Copy and notice to defendants.

Feb. 16, 1920. Court filed findings of fact and conclusion of law dismissing petition. Judgment against plaintiff for cost of printing of record in the sum of \$234.77. Opinion by Judge Downey.

April 16, 1920. Claimant's motion to amend findings of fact and to set aside judgment filed. Copy and notice to defendants.

May 3, 1920. Claimant's motion to amend findings and to set aside judgment, to the law calendar and set for Monday, May 24, 1920.

May 24, 1920. Defendant's objections to plaintiff's

motion to amend findings of fact, set aside judgment, and grant a new trial filed. Copy to claimant's attorney.

May 24, 1920. Claimant's motion to amend findings of fact and to set aside judgment argued and submitted.

June 1, 1920. Claimant's motion to amend findings of fact and to set aside judgment overruled.

June 7, 1920. Claimant's motion for leave to file amendment to the petition and to set aside submission in this case and cases Nos. 32913 and 32901 (presented for filing May 28, 1920) overruled this day.

June 14, 1920. Motion of heirs of claimant for leave to file motion for setting aside judgment overruling motion filed and submitted in open court. Defts. notified.

June 21, 1920. Motion of heirs for leave to file motion to set aside overruling of motion for new trial overruled.

Dec. 4, 1920. Motion of Jeromina Sanguinetti Administratrix, de bonis non of Stefano Sanguinetti deceased, to be substituted claimant, with certified copy of Letters of Administration and power of attorney filed. Copy and notice to defendants.

Dec. 13, 1920. Court filed an order allowing plaintiff's motion to substitute Administratrix, etc. See Order.

Feb. 14, 1921. Plaintiff's motion to set aside judgment and to admit new pleadings, and motion to amend findings, and motion to file new petition (presented for filing Feb. 10, 1921). Allowed to be received and filed, and considering them as filed the court overruled each of said several motions. (See order filed.)

May 4, 1921. Claimant's application for appeal (filed May 4, 1921) allowed in open court.

Oct. 4, 1921. Record on appeal delivered to attorney of record.

I, F. C. Kleinschmidt, Assistant Clerk, Court of Claims, do hereby certify that the foregoing entries are true copies of all the docket entries in the above entitled case.

(Seal.)

A true copy. Test:

This 8th day of November, 1923.

F. C. KLEINSCHMIDT,

*Assistant Clerk, Court of Claims.*

**EXHIBIT D.****IN THE COURT OF CLAIMS.****No. 32914.****JEROMINA SANGUINETTI, AS ADMINISTRA-  
TRIX DE BONIS NON OF THE ESTATE  
OF STEFANO SANGUINETTI***vs.***THE UNITED STATES.****Motion to Set Aside Judgment and to Admit New  
Pleadings.**

Petitioner moves the court that its judgment entered on the 13th day of December, 1920, upon her substitution as claimant, by which this suit was dismissed, will temporarily be set aside and that she may then have leave to file her petition and her request for amendment of the findings of fact, both of which are presented herewith.

**Memorandum.**

This motion does not contemplate any further resistance to the dismissal of the suit. Its only purpose is to substitute an adequate petition and to accomplish the few amendments of the findings of fact which claimant regards as of vital importance. These amendments being accomplished, claimant will not seek to delay further the final determination of the case by argument or any other steps. It is anticipated that, upon the filing of the papers now presented and the court's action upon the request for amendments of the findings, the adverse judgment will be entered anew; but then the case will be in condition for appeal without jeopardizing any interest of claimant.

The proposed new petition is in substance the same as that which the heirs of claimant's decedent, both before and after the judgment, vainly attempted to file. It sets up the facts (1) that the project in question

was designed and performed for improvement in navigation and (2) that the levee, on the south side of the canal, was an integral part of the project, designed to control such flood waters as should exceed the capacity of the canal. Without these ~~amendments~~ the sufficiency of the pleading might well be questioned.

A separate short brief, regarding the designed amendments of the findings, is appended to the motion in that regard.

BENJ. CARTER,  
*Attorney for Claimant.*

Filed Feb. 14, 1921.

A true copy:

Test this November 10, 1923.

F. C. KLEINSCHMIDT,  
*Assistant Clerk, Court of Claims.*